



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION
Case #: MOP - 203443

PRELIMINARY RECITALS

Pursuant to a petition filed on October 15, 2021, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Public Assistance Collection Unit regarding Medical Assistance (MA), a hearing was held on November 30, 2021, and December 7, 2021, by telephone.

The issue for determination is whether the respondent correctly determined petitioner was liable for a MA/BCP overpayment stemming from his wife's failure to report him in the home.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

[REDACTED]
Legal Action of Wisconsin
633 W Wisconsin Ave. St. 2000
Milwaukee, WI 53203

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703

By: [REDACTED] and [REDACTED]
Public Assistance Collection Unit
P.O. Box 8938
Madison, WI 53708-8938

ADMINISTRATIVE LAW JUDGE:

Jason M. Grace
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County. His wife, C.R., and their children-in-common, are also residents of Milwaukee County.

2. Petitioner and C.R. married on August 1, 2015. Respondent's Exhibit 5b.
3. On August 5, 2015, C.R. completed an online application for FS and health care benefits. She reported herself and two minor children in the home. She did not report petitioner in the home or include his income when reporting total household income. Respondent's Exhibits 2 and 4b.
4. On January 13, 2016, C.R. called the local county agency and reported that her last name changed due to a marriage on August 1, 2015. She further indicated that her husband never moved into her home as they separated later that month. Respondent's Exhibit 2.
5. On February 18, 2016, C.R. contacted the child support agency. She indicated that she and petitioner were married in August 2015 and that she wanted child support to stop. Respondent's Exhibit 5d.
6. C.R. completed FS or health care applications, renewals, interviews, and/or Six Month Report Forms (SMRF) on or about February 1, 2016; July 22, 2016; February 8, 2017; August 24, 2017; August 28, 2017; May 11, 2018; July 23, 2018; June 13, 2019; July 26, 2019; and January 7, 2020. She never reported petitioner in the home or include his income when reporting total household income. Respondent's Exhibits 2, 4d, 4e, 4f, 4g, 4h, 4i, 4k, 4l, and 4m.
7. On October 8, 2020, petitioner and C.R. signed a loan application for funding the purchase of a residence located at [REDACTED]. By signing the application, they agreed and acknowledged that the information provided was true and correct and that any intentional or neglect misrepresentations may result in civil liability and/or criminal penalties, including, but not limited to, a fine or imprisonment. They both attested that their address at that time was [REDACTED]. For the length of time at that address, both indicated "3Y 6M." Respondent's Exhibit 5o.
8. On October 22, 2020, C.R. called the county agency and applied for FS. She reported an address of [REDACTED]. Respondent's Exhibits 2 and 4n. She reported a household consisting of herself and three minor children. She did not report petitioner in the home or include his income when reporting total household income. Respondent's Exhibits 2 and 4n.
9. C.R. lived at the following addresses:
 - August 2015 – October 2016: [REDACTED]
 - October 2016 – October 2020: [REDACTED]
 - October 2020 – May 2021: [REDACTED]
 Respondent's Exhibits 2, 4b-4m, 5h, 5l, and 5m.
10. Petitioner was employed with [REDACTED]. He had earned income from that employer in each of the months of January 2015 – June 2015, August 2015, January 2016 - March 2020, and May 2020 – December 2020. Respondent's Exhibit 5c.
11. [REDACTED] reported to the agency that petitioner's addresses were as follows: [REDACTED] for 2010 – 2012; [REDACTED] for 2015-2016; and [REDACTED] since 2016. Respondent's Exhibit 5c.
12. Per CCAP records, petitioner's address was reported to the court on September 10, 2016, as [REDACTED]; September 11, 2017, as [REDACTED]; and April 28, 2019, as [REDACTED]. Respondent's Exhibits 5e, 5k, and 5n.
13. The agency obtained a TransUnion consumer credit report for petitioner on May 15, 2021, that reported his address in November 2016 as [REDACTED], and as of November 2020 as [REDACTED]. Respondent's Exhibit 5j.
14. On July 11, 2017, petitioner received a prison sentence in Milwaukee County Case [REDACTED] of 8 years initial conference and 6 years extended supervision. That sentence was stayed and he was

placed on probation for 8 years. Conditions of probation included 8 months of jail. The conditional jail term commenced July 13, 2017 and ended February 23, 2018. He was granted Huber release for purposes of work. He was not granted child care privileges. Petitioner's Exhibit P-1 and P- 2.

15. On April 2, 2018, petitioner's then probation officer conducted a scheduled home visit with him at [REDACTED] Respondent's Exhibit 7 and Testimony of Probation Officer K.A. and petitioner.
16. Petitioner reported to the Department of Corrections that he lived at [REDACTED] WI, from September 2016 until October 2020 and then thereafter at [REDACTED] Respondent's Exhibit 7 and Testimony of Probation Officer K.A.
17. On or about May 7, 2021, M.R., petitioner's mother and resident of [REDACTED] left a voice message with OIG Investigator [REDACTED] in response to a letter she received. M.R. indicated in that message that C.R., petitioner, and their children. "...did not live at my home, have not lived at my home." Respondent's Exhibit 5r and testimony of [REDACTED]
18. In an email sent to the agency in May 2021, R.P., C.R.'s prior landlord, indicated that in October 2016 C.R. and her children rented a residence at [REDACTED] RP. further noted that petitioner was not present when C.R. first moved in. Respondent's Exhibit 5h.
19. On or about August 31, 2021, the agency issued eight separate notices of MA/BCP Overpayment to the petitioner (and also to his wife) informing them that they were jointly liable for the overpayments due to "FAILURE TO REPORT ACCURATE HOUSEHOLD MEMBERS due to CLIENT ERROR," as follows:
 - \$2,688.15, 10/1/17-5/31/18, Claim # [REDACTED]
 - \$3,964.43, 6/1/18 – 5/31/19, Claim # [REDACTED]
 - \$70.47, 1/1/16 – 1/31/16, Claim # [REDACTED]
 - \$117.00, 3/1/16 – 6/30/16, Claim # [REDACTED]
 - \$1,528.50, 1/1/18 – 12/31/18, Claim # [REDACTED]
 - \$840.82, 2/1/19 – 7/31/19, Claim # [REDACTED]
 - \$1,037.26, 9/1/15 – 1/31/16, Claim # [REDACTED]
 - \$4,671.00, 9/1/16 – 8/31/17, Claim # [REDACTED]

Exhibit 1d.

20. Petitioner timely filed an appeal with the Division of Hearings and Appeals.

DISCUSSION

MA overpayment recovery is authorized by Wis. Stat., §49.497(1):

(a) The department may recover any payment made incorrectly for benefits provided under this subchapter or s. 49.665 if the incorrect payment results from any of the following:

1. A misstatement or omission of fact by a person supplying information in an application for benefits under this subchapter or s. 49.665.
2. The failure of a Medical Assistance or Badger Care recipient or any other person responsible for giving information on the recipient's behalf to report the receipt of

income or assets in an amount that would have affected the recipient's eligibility for benefits.

3. The failure of a Medical Assistance or Badger Care recipient or any other person responsible for giving information on the recipient's behalf to report any change in the recipient's financial or nonfinancial situation or eligibility characteristics that would have affected the recipient's eligibility for benefits or the recipient's cost-sharing requirements.

See also BCP Handbook, 28.2. The overpayment must be caused by the client's error. BCP overpayments caused by agency error are not recoverable. Legally married spouses living in the household at the time the overpayment occurred are jointly liable for the overpayment. BCP Handbook, 28.4.3.

An overpayment is determined as follows: "If the case was ineligible for BC+, recover the amount of medical claims paid by the state and/or the capitation rate. Use the ForwardHealth interChange data from the Total Benefits Paid by Medicaid Report(s). Deduct any amount paid in premiums (for each month in which an overpayment occurred) from the overpayment amount." BCP Handbook, 28.4.2. If the case is still eligible for BCP for the period in question, then the overpayment is calculated as follows:

If the case is still eligible for BadgerCare Plus for the time frame in question but there was an increase in the premium, recover whichever is less of the following:

- The difference between the premiums paid and the premium amount owed
- The amount of claims and any HMO capitation payments the state paid for each month in question

When calculating the overpayment amount for premiums, the overpayment amount is the difference between the premium paid and premium owed, even if the premium that was paid was \$0. Premium adjustments are only made on months where there is an overpayment. If there is a month in which there is no overpayment, then the premium calculation for that month should not be adjusted.

BCP Handbook, 28.4.2.

BCP eligibility determinations use Modified Adjusted Gross Income (MAGI) rules. MAGI rules are based on the concept of a person's tax household or filing status, not necessarily on the physical household or family relationships. BCP Handbook, 2.3. For married couples who are living together, they are always included in each other's group size, even if they are filing taxes separately. *Id.* at 2.3.1.1. If a married couple is living apart but filing jointly, the couple is included in each other's group size. *Id.* If the married couple is living apart and filing taxes separately, or are not planning to file taxes, do not include them in each other's group size. *Id.*

There was no real controversy in this case about computation and income of petitioner and his wife. The agency did not provide evidence as to their tax filing status. Thus, the dispute boiled down to whether petitioner was actually living with his wife and children during the overpayment period alleged. If so, his income would be attributable to the household.

It was petitioner and his wife's position that they only lived together for a few weeks after they were married on August 1, 2015. After that point, petitioner lived mainly with his mother. It is their claim that he was using his wife's address with his employer, the court, and his probation officer, but that he was not actually living there. He claims he used her address as it was a more stable environment than his mother's residence. It was further argued by counsel that petitioner should not be included in the household for the period of July 13, 2017, through February 23, 2018, as he was serving a conditional jail term at that time.

Petitioner and his wife acknowledged that they started living together in October 2020 after purchasing a residence at [REDACTED].

The petitioner and his wife testified. Petitioner's mother also testified that he lived with her during the overpayment period except for when he was incarcerated. The agency presented an audio recording of a voice message that the mother left with one of the OIG investigators in May 2021. In that message the mother reported that petitioner and his wife never lived with her. The mother testified that if she had left such a message she would have meant that petitioner had not lived with her in the past year.

The agency presented testimony from petitioner's most recent probation officer. She indicated that a review of his supervision notes indicated that a prior probation officer conducted a scheduled home visit with him in April 2018. The visit was conducted at the address where the wife was living at the time, which was [REDACTED]. It was the only home visit conducted during the period in dispute. Petitioner testified that the home visit was a scheduled visit. As such, he knew when to arrive at his wife's residence to meet with the probation officer.

While the rules of evidence are relaxed in administrative hearings, decisions cannot be based solely upon uncorroborated hearsay. *Gehin v. Wisconsin Group Ins. Bd.*, 278 Wis. 2d 111 (2005) ("[u]ncorroborated hearsay evidence, even if admissible, does not by itself constitute substantial evidence."). Hearsay is a "... statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Wis. Stats. § 908.01(3). A "statement" is "... (a) an oral or written assertion or (b) nonverbal conduct of a person, if it is intended by the person as an assertion." Wis. Stats. § 908.01(1).

Of note, prior inconsistent statements of a witness who testifies at a hearing is not hearsay. Wis. Stats. § 908.01(4)(a). Also, a statement is not hearsay if it is offered against a party and is the "... party's own statement, in either the party's individual or a representative capacity." Wis. Stats. § 908.01(b)1.

Based on my review of the record, I find that the agency has proven by a preponderance of the evidence that petitioner he has been living with his wife since April 8, 2017, except for the period he was incarcerated in jail.

While the agency presented no witness with personal knowledge of the petitioner's living situation, the record contains a signed, written statement of both petitioner and his wife as to that situation. That statement is not hearsay. That statement is found in a loan application petitioner and his wife signed on October 8, 2020. In that application, both indicated they had lived at [REDACTED] for 3 years and 6 months. This amounts to an admission to living together starting April 8, 2017. Failure to provide accurate information in that application would jeopardize their home loan and subject them to possible civil and criminal liability. This imbues that statement with indicia of reliability.

The agency introduced other compelling evidence that further corroborates the statement in the loan application. That evidence includes the petitioner reporting to his employer, the courts, and his probation officer the same address as where his wife was living at the time. His only home visit conducted with his probation officer during this period was at his wife's address. He did not claim during his testimony that he ever notified his probation officer that he was in fact living with his mother. This evidence is further supported by addresses contained in his consumer credit report. The statement of his living situation contained in the loan application is also not inconsistent with the statement of C.R.'s landlord at [REDACTED]. That landlord indicated that petitioner was not living with his wife when she first moved into the residence in October 2016. I find the sum of the agency's evidence more compelling than the self-serving testimony of petitioner and C.R.

Neither petitioner nor C.R. addressed the loan application during their testimony. C.R. also did not report during her August 5, 2015, FS application and interview that she married petitioner and he was living with her at that time. She testified that they lived together for approximately a month after they married on August 1, 2015. She also did not report on October 22, 2020, during her FS renewal that petitioner was living with her after they purchased a house together. She claimed that the dire health of her father caused her not to be in the right frame of mind. Undermining such a claim is that she was apparently in the right frame of mind to report a decrease in income during that call. See, Exhibit 2. She also never reported him in the home in the six months that followed that call. This amounts to a pattern of misrepresenting or failing to report accurate information about household composition and total household income. She was not found to be a credible witness. The testimony of petitioner's mother was contradicted by a prior recorded statement she left with an OIG investigator. Her attempt to explain away that statement was not found persuasive.

The limitation of the residential loan application is that it only addresses the living situation since April 8, 2017. This does not encompass the entirety of the overpayment period. The largely hearsay evidence in the record that addresses the living situation prior to April 8, 2017, was not found sufficient. As such, I find that the agency did not meet its burden to provide substantial evidence that petitioner and C.R. lived together prior to April 8, 2017. Thus, I will order the agency on remand to rescind the overpayment that was based on petitioner and his wife living together September 1, 2015 - April 7, 2017.

The BCP policy for the treatment of incarcerated individuals in effect in 2017 and 2018 indicates that "Huber law prisoners who are released for a purpose other than attending to the needs of their families are not eligible for BadgerCare Plus. Consider them to be absent parents." BCP Handbook, 2.4 (Release 17-01). That policy further indicates that inmates of a public institution are "...not considered to be living in the household even if they are temporarily absent from the home." Id at 2.4.1 (exceptions provided are not applicable here).

Petitioner was serving a conditional jail term July 13, 2017, through February 23, 2018. The record indicates he was afforded Huber privileges solely for work-release. As such, he is not considered to be living in the household during his period of incarceration.

In summary, I find that the preponderance of the evidence indicates petitioner lived with his wife April 8, 2017, through July 12, 2017, and February 24, 2018, through May 2021.

CONCLUSIONS OF LAW

1. Petitioner lived with his wife and should have been included in her BCP household April 8, 2017, through July 12, 2017, and February 24, 2018, through July 31, 2019.
2. Petitioner's wife failed to report to the respondent petitioner's income for the periods of April 8, 2017, through July 12, 2017, and February 24, 2018, through July 31, 2019.
3. The respondent has not met its burden to prove that petitioner lived with his wife September 1, 2015, through April 7, 2017, and July 13, 2017, through February 23, 2018.
4. The respondent has established an overpayment of MA/BCP benefits to petitioner, but has not established the exact amounts of the overpayments identified at Finding of Fact 19, above.

THEREFORE, it is

ORDERED

That this matter is remanded to the respondent with the following instructions: recalculate the overpayment based on a finding that petitioner was living with his wife April 8, 2017, to July 12, 2017, and February 24, 2018, to July 31, 2019. The respondent is to rescind any overpayment that was based on its finding that the petitioner and his wife lived together September 1, 2015 to April 7, 2017, and July 13, 2017 to February 23, 2018. Written notice of the recalculation shall be issued to petitioner and his wife. These actions shall be completed within 10 days of the date of this decision.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 4822 Madison Yards Way, 5th Floor North, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

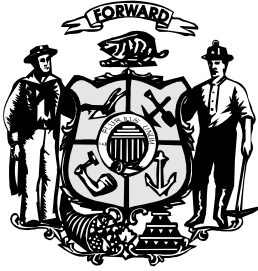
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 20th day of January, 2022



\s _____
Jason M. Grace
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on January 20, 2022.

Public Assistance Collection Unit
Public Assistance Collection Unit
Division of Health Care Access and Accountability

